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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HOMERO MARTINEZ LOPEZ,

Defendant and Appellant.

H043659

(Santa Clara County

Super. Ct. No. C1527682)

I. INTRODUCTION

Defendant Homero Martinez Lopez pleaded no contest to possession for sale of methamphetamine (Health & Saf. Code, § 11378) and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364), and he admitted having served a prior prison term (Pen. Code, § 667.5, subd. (b)). He was placed on probation for three years, with conditions that included having all of his electronic devices subject to forensic analysis search.

On appeal, defendant challenges the electronic devices search condition, claiming it is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and that it is unconstitutionally overbroad. For reasons that we will explain, we will affirm the order of probation.

II. BACKGROUND

On December 28, 2015, police responded to a complaint about a person selling drugs out of a red SUV. An officer found defendant sleeping in a vehicle and determined that he had two outstanding warrants. A search of the vehicle revealed two bags of methamphetamine, a methamphetamine pipe, and two cell phones.

Defendant was charged with possession for sale of methamphetamine (Health & Saf. Code, § 11378) and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364), and it was alleged that he had served a prior prison term (Pen. Code, § 667.5, subd. (b)). Pursuant to a plea agreement, defendant pleaded no contest to the two charges and admitted the prior prison term allegation.

At the sentencing hearing, defendant was placed on probation for three years. The trial court imposed the following conditions: “Defendant shall submit his person, place of residence, vehicle, and any property under his control to search at any time without a warrant by any peace officer. Defendant’s computer and all other electronic devices including, but not limited to, cellular telephones, laptop computers, or notepad[s] shall be subject to forensic analysis search.”

The prosecutor argued that there was a “very strong nexus between the crime committed in this case and the use of electronic information,” noting that defendant’s cell phone had contained “a number of e-mails that were relevant to the charges in this case.”

Defendant’s trial counsel acknowledged that an email tied defendant to his cell phone, and that there was “narcotics-related information” in text messages on that cell phone. Defendant’s trial counsel asked the trial court to limit the probation condition to “any cellphone and text messages contained therein,” arguing that the condition was overbroad insofar as it permitted a search of his computer and “all other electronic devices.”

The prosecutor argued that text messages alone would be insufficient to prove identity and that access to “other information” in his cellphone was important. The

prosecutor also argued that drug dealers and drug users commonly send and receive emails about “the product,” and that there is a “growing trend” among drug dealers to use “other apps” that conceal their sales.

The trial court found that “given the facts of this case,” it was appropriate to impose the electronic devices search condition.

III. DISCUSSION

A. Overbreadth

We review the constitutionality of a probation condition de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*)) “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*Id.* at p. 890.)

Defendant contends the electronic devices search condition is overbroad because it infringes on his constitutional right to privacy. He asserts that his claim is supported by the reasoning of *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*), in which the United States Supreme Court held that the warrantless search of a suspect’s cell phone implicated and violated the suspect’s Fourth Amendment rights. (*Id.*, 134 S.Ct. at p. 2493.) In so holding, the court explained that modern cell phones, which may have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person’s life. (*Id.* at pp. 2488-2489.) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, “not that the information on a cell phone is immune from search.” (*Id.* at p. 2493.)

As *Riley* did not involve probation conditions, it is inapposite. Unlike the defendant in *Riley*, who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence, defendant is a probationer.

“Inherent in the very nature of probation is that probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.” ’ [Citations.] Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.” (*United States v. Knights* (2001) 534 U.S. 112, 119.)

This court rejected an overbreadth argument in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), where the challenged probation condition required the defendant to “ ‘provide all passwords to any social media sites, including Facebook, Instagram and Mocospace and to submit those sites to search at any time without a warrant by any peace officer.’ ” (*Id.* at p. 1172.) The *Ebertowski* defendant was a member of a criminal street gang who had promoted his gang on social media. This court rejected the defendant’s claim that the probation condition was “not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association.” (*Id.* at p. 1175.) This court explained that the state’s interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), a different panel of this court distinguished *Ebertowski* and found unconstitutionally overbroad a probation condition requiring the defendant’s electronic devices to be “ ‘subject to forensic analysis search for material prohibited by law.’ ” (*Appleton*, at p. 721.) In *Appleton*, the defendant was convicted of false imprisonment based on an incident that occurred about a year after he used a social media website to meet the minor victim. (*Id.* at p. 719.) The *Appleton* panel held that the electronic devices search condition was overbroad because it “would allow for searches of vast amounts of personal information unrelated to defendant’s criminal conduct or his potential for future criminality.” (*Id.* at p. 727.) The *Appleton* panel concluded that “the state’s interest here—monitoring whether defendant

uses social media to contact minors for unlawful purposes—could be served through narrower means,” such as by imposing “the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring.” (*Ibid.*, fn. omitted.)

Here, the probation condition requiring defendant’s electronic devices be subject to forensic analysis search serves the state’s interest in preventing defendant from using electronic devices to engage in narcotics sales. Indeed, defendant recognizes that some intrusion on his privacy rights would be justified, but he asserts that the probation condition should be “limited to the applications or programs on a cell phone that might be used by [defendant] to communicate a controlled substance sale.” He contends the condition should not permit a search of his social media accounts “because social media would not contain any evidence of controlled substance sales.” However, as the prosecutor pointed out, drug dealers may use electronic devices to communicate and conduct sales on a number of platforms, including social media messaging. Limiting the probation condition to certain applications on defendant’s cell phone would not permit the probation officer to ensure defendant is not conducting drug sales through other applications or through a computer or notepad, both of which are commonly-owned electronic devices. Thus, the probation condition is closely tailored to the purposes of the condition in this case. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) The government’s interest in ensuring defendant complies with the terms of his probation outweighs the minimal intrusion on defendant’s privacy rights. We therefore conclude that the challenged probation condition is not constitutionally overbroad.¹

¹ The California Supreme Court has granted review in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, which presents the question whether a probation condition requiring a minor to submit to warrantless searches of his “electronics including passwords” is overbroad. (*Id.* at p. 886.) Review has been granted in a number of other cases presenting similar issues, with briefing (continued)

B. Reasonableness

Defendant next contends the electronic devices search condition is unreasonable.

Under the test set forth in *Lent, supra*, 15 Cal.3d 481, a condition of probation will be held invalid if it “ ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*Id.* at p. 486, fn. omitted.) “This test is conjunctive – all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long the condition is reasonably related to preventing future criminality.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

Defendant points out that cell phones were the only electronic devices in his possession at the time of his arrest. He notes that “the use of electronics generally” is not criminal. He acknowledges that there was evidence he had used his cell phone to arrange for some drug sales, but he contends that without evidence he used other electronic devices to engage in drug sales, the challenged condition is not reasonably related to future criminality.

We disagree. The condition requiring all of defendant’s electronic devices to be subject to search is related to his future criminality. Since defendant had used an electronic device to arrange drug transactions, it was reasonable for the trial court to give the probation officer the ability to ensure that defendant was not violating his probation

deferred. (See, e.g., *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.)

by arranging drug sales through any electronic devices—whether a cell phone, computer, or tablet. (Cf. *In re Erica R.* (2015) 240 Cal.App.4th 907, 913-915 [electronics search condition unreasonable where minor committed misdemeanor possession of Ecstasy; there was no indication that she was involved in sales of drugs or that she had ever used an electronic device].) Although the evidence showed defendant had used only a cell phone to conduct drug deals, it was permissible for the trial court to impose a more “wide-ranging” electronics search condition, “for conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender’s precise crime.” (*People v. Moran* (2016) 1 Cal.5th 398, 404-405.) We conclude the trial court did not abuse its discretion by imposing the electronic devices search condition.

IV. DISPOSITION

The order of probation affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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